TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 516.

HARRY J. JAQUITH, TRUSTEE, APPELLANT,

vs.

G. EDWIN ALDEN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

FILED DECEMBER 9, 1902.

(18,744.)

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[illegible] Detweiler, Printers, Washington, D. C., December 17, 1902.

a United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

HARRY J. JAQUITH, Trustee, Appellant,
v.
G. EDWIN ALDEN, Creditor, Appellee. } No. 444.

In the matter of F. N. Woodward *et al.*, bankrupts; *Ex parte* G. Edwin Alden, creditor.

Appeal from the district court of the United States for the district of Massachusetts from decree (Lowell, J.), June 21, 1902.

Transcript of Record of United States Circuit Court of Appeals for the First Circuit.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

HARRY J. JAQUITH, Trustee, Appellant,
v.
G. EDWIN ALDEN, Creditor, Appellee. } No. 444.

In the matter of F. N. Woodward *et al.*, bankrupts; *Ex parte* G. Edwin Alden, creditor.

Transcript of Record of District Court.

(Filed in circuit court of appeals July 7, 1902.)

District Court of the United States, District of Massachusetts.

In re F. N. WOODWARD ET AL., Bankrupts. No. 5451. In Bankruptcy.

Proof of Debt of G. Edwin Alden.

(Filed March 10, 1902, and substituted for proof filed December 26, 1901.)

At Cambridge, in said district of Massachusetts, on the twenty-third day of January, A. D. 1902, came G. Edwin Alden, of Boston, in the county of Suffolk, in said district of Massachusetts, and made oath, and says that F. N. Woodward *et al.*, the persons by whom a petition for adjudication of bankruptcy has been filed, *was*, at and before the filing of said petition, and still *is*, justly and truly indebted to said deponent in the sum of five hundred forty-six and 89/100 dollars; that the consideration of said debt is as follows:

2 Merchandise as per itemized account annexed; that no part of said debt has been paid; that no note has been re-

ceived for said account, and no judgment rendered thereon; that there are no set-offs or counter-claims to the same; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

G. EDWIN ALDEN, *Creditor.*

Subscribed and sworn to before me this twenty-third day of January, A. D. 1902.

JOSEPH P. KEEFE,
Justice of the Peace.

(Indorsed on back:) No. 5451.. In bankruptcy. Law of 1898. Proof of unsecured debt. In the matter of F. N. Woodward *et al.*, bankrupt-. G. Edwin Alden, creditor. Address 176 Federal St., Boston. $546.89. Filed March 10, 1902; substituted for claim filed Dec. 26, 1901. Johnson & Krebs, attorney-. Address 113 Devonshire St.

3 (Attached thereto is the following:)

Telephone main.

BOSTON, MASS., *Jan.* 22*nd*, 1902.

Mess. F. N. Woodward & Co., West Watertown, Mass., to G. Edwin Alden, Dr.

New England agent Diamond Rubber Co., reclaimed rubber; International Pulp Co., asbestine talc: Wm. H. Schell, tripolite; substitutes, black mineral, mineral white, etc. Rubber manufacturers' agent. Buyer of rubber scrap. Washing, grinding, and massing rubber a specialty. 176 Federal street, room 305.

Net 30 days.

Nov. 6.	2 cases old fine Para rubber, 732–143–589 net .91c...	$535	99
	Carting		50
		$536	49
Oct. 31.	13 bales asbestine, 2080 lbs., at 10 per 2000 lbs....	10	40
		$546	89

Certificate by Referee to Judge.

(Filed April 8, 1902.)

I, Henry E. Warner, Esq., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings:

One G. Edwin Alden petitioned to be allowed to prove as a creditor against the estate of the bankrupts a claim amounting to five

hundred forty-six and 89/100 dollars ($546.89) for merchandise sold to the bankrupts in the regular course of business as follows:

Oct. 18, 1901.	589 lbs. Para rubber, @ .91	$535	99
" " "	Cartage		50
" 30, "	2080 lbs. asbestine, @ .10	10	40
		$546	89

4 The bankrupts were adjudicated to be bankrupt upon their voluntary petition on the twenty-sixth day of November, 1901, and the evidence showed that they became insolvent about Aug. 15, 1901; that the creditor was ignorant of this fact, and that the sales were made and the payments received in the regular course of business, and without any idea or intention on the part of the creditor of obtaining a preference thereby.

The evidence further showed that the only transaction- between the petitioning creditor and the bankrupts during a period of four months prior to the adjudication were had after the bankrupts became insolvent, and were as follows:

Sales to Bankrupts by Creditor.

Aug. 17, 1901.	Rubber	$289	46
" 28, "	"	657	89
Sept. 30, "	"	644	28
Oct. 18, "	"	535	99
" " "	Cartage		50
" 31, "	Asbestine	10	40
		$2138	52

Payments of Bankrupts During a Period of Four Months Prior to Adjudication.

Sept. 4, 1901.	Payment of bill Aug. 17	$289	46
" 28, "	" " " " 28	657	89
Oct. 29, "	" " " " Sept. 30	644	28
		$1591	63
	Balance	546	89

As appears from the statement of the account the payment- were in each instance payments of single bills, and were made quite regularly.

It further appeared that the merchandise sold to the bankrupts was manufactured by them, and that the result of the transactions was to increase in value the estate of the bankrupts.

It will be seen that the last item of payment is Oct. 29, 1901, when $664.28 was paid to the creditor. After that the only further credit given by the creditor was the item of Oct. 31, $10.40.

The creditor asked me to rule that inasmuch as the balance for

which he asked to prove was greater than the amount of the
5 indebtedness at the beginning of the four months there was no preference which he should be ordered to surrender. I am, however, unable to take that view of the law. It seems to me that when any payment is made the question as to whether that payment is a preference must be determined by what took place afterward, and not by what took place before. If the last item of the transaction was the payment of $644.28 on Oct. 29, it seems clear to me that it would be a preference within the decision of the supreme court. The fact that after that the small sum of $10.40 was sold on credit does not seem to me to alter this fact or to do more than to allow that $10.40 to be deducted from the preference.

If the view contended for by the creditor were to be adopted it would amount to saying that any person whose dealings were entirely within the four months preceding bankruptcy could not under any circumstances receive a preference. In other words, if the test is whether or not the debt has been increased during the four months, one who was not a creditor at all at the beginning of the four months and is a creditor at the time of bankruptcy has a debt which has been increased during the four months and therefore cannot have received a preference.

In view of the rulings of the supreme court I am unable to take this view of the law, and therefore I rule that the payment of Oct. 29, being for an amount greater than the subsequent credit extended, is a preference, at least to the amount of $633.80, and that the claim cannot be allowed unless that amount is surrendered.

At the request of the creditor this question is certified to the judge for his opinion.

H. E. WARNER,
Referee in Bankruptcy.

Boston, April 2, 1902.

Decree on Certified Question.

Ex Parte G. EDWIN ALDEN.

At Boston, in said district, on the twenty-first day of June, A. D. 1902, upon the question certified to the court by the referee in said matter on the eighth day of April, A. D. 1902, now, therefore, after hearing arguments of A. T. Johnson, Esq., of counsel for the
6 creditor, and H. J. Jaquith, Esq., trustee, and after due consideration of the same:

It is hereby ordered and decreed that the judgment of the referee be and it hereby is reversed and the claim allowed proof.

It is further ordered that the clerk send a copy of this order by mail to the referee.

Witness the Honorable Francis C. Lowell, judge of said court, and the seal thereof, this twenty-first day of June, A. D. 1902.

[SEAL.] F. S. FISKE,
Deputy Clerk.

Opinion of the District Court.

June 21, 1902.

LOWELL, *J.:*

The bankrupts filed their voluntary petition November 26, 1901. They were insolvent since August 15. The creditor who seeks to prove was ignorant of this fact. On August 15 the bankrupts were not indebted to the creditor. Subsequent to that time the sales by the creditor to the bankrupts and the payments by the bankrupts to the creditor were as follows:

Sales to Bankrupts by Creditor.

Aug. 17, 1901.	Rubber	$289 46		
28, "	"	657 89		
Sept. 30, "	"	644 28		
Oct. 18, "	"	535 99		
18, "	Cartage	50		
31, "	Asbestine	10 40		
			$2138	52

Payments by Bankrupts to Creditor.

Sept. 4, 1901.	Payment of bill Aug. 17	$289 46		
28, "	" " " 28	657 89		
Oct. 29, "	" " " Sept. 30	644 28		
			1591	63
Balance			546	89

If all these transactions be treated as one, it follows under the rule of *Dickson v. Wyman* that no preference was given. The trustee contends, however, that only those advances made by the
7 creditor after the last payment received by the creditor from the bankrupts are to be taken into account in determining whether a preference was received or not. The contrary was decided by this court in *In re Topliffe*, 114 Fed. Rep. 323, and no sufficient reason has been shown in the learned and elaborate brief of counsel for the trustee to overrule the decision there reached.

The facts in the other case submitted, viz: *In re Woodward, Ex parte Atlas Chemical Co.*, were substantially the same, and no preference was given in either case.

The judgment of the referee is reversed and the claims are allowed proof.

Petition of Trustee for Appeal.

(Filed June 26, 1902.)

To the honorable the district judge of the United States for the district of Massachusetts:

And now comes Harry J. Jaquith, trustee in the above bankruptcy case, and complains that manifest error hath happened to the great damage of your petitioner in the record and final judgment of this court on the allowance of the claim of G. E. Alden, a creditor of the bankrupt, said claim as allowed being in excess of the sum of $500.

Wherefore, your petitioner prays that he may be allowed to appeal to the circuit court of appeals for the first circuit to the end that said error may be corrected and full and speedy justice done in this behalf.

And your petitioner files herewith an assignment of error which sets out separately and particularly each error asserted and intended to be urged.

HARRY J. JAQUITH.

June 26, 1902.

Allowed.
FRANCIS C. LOWELL,
U. S. District Judge.

8 *Assignment of Errors by Appellant.*

(Filed June 26, 1902.)

To the honorable the district judge of the United States for the district of Massachusetts:

And now comes Harry J. Jaquith, trustee of the above bankrupt estate, and says that in the record and final judgment in the above-entitled proceedings there is error in this, to wit:—

That the district judge erroneously determined that the admitted facts set out in the referee's certificate did not show a preference under the bankruptcy act which must be surrendered before the claim is allowed proof, and entered final judgment allowing the claim.

HARRY J. JAQUITH.

Request of Appellant as to Appeal Record.

(Filed June 28, 1902.)

BOSTON, *June* 28, 1902.

To the clerk of the United States district court for the district of Massachusetts:

No. 5451.

Please make up the appeal record in the matter of F. N. Woodward *et al.*, bankrupts, *Ex parte* G. Edwin Alden, as follows:

1. Proof of claim offered for allowance by G. E. Alden.
2. Certificate of referee, H. E. Warner, thereon.
3. Judgment of district judge.
4. Opinion of Judge Lowell.
5. Petition for appeal.
6. Assignment of errors.
7. Citation.
8. Request for making record.

HARRY J. JAQUITH,
Appellant, pro se.

9 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to G. Edwin Alden, of Wellesley, in said district, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the twenty-fourth day of July next, pursuant to an appeal duly obtained from a decree of the district court of the United States for the district of Massachusetts, wherein Harry J. Jaquith, as he is trustee in bankruptcy of the estate of Frederick W. Woodward *et al.*, is appellant, and you are appellee, to show cause, if any there be, why the said decree entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis C. Lowell, judge of the district court of the United States for the district of Massachusetts, this twenty-sixth day of June, in the year of our Lord one thousand nine hundred and two.

FRANCIS C. LOWELL,
U. S. District Judge.

JUNE 28, 1902.

Service of the within citation in behalf of the within-named G. Edwin Alden is hereby accepted.

A. T. JOHNSON,
Attorney for G. Edwin Alden.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Massachusetts,* } ss:

I, Frank H. Mason, clerk of the district court of the United States for the district of Massachusetts, certify that the foregoing are true copies of the following papers filed in said court in the cause in bankruptcy, No. 5451, Frederick N. Woodward, *et al.*, bankrupts.

1. Proof of debt of G. Edwin Alden.
2. Certificate by referee to judge.
3. Decree on certified question.
4. Opinion of the court.
5. Petition for appeal.
6. Assignment of errors.
8. Request of appellant as to appeal record.

and also the original citation (7) issued upon the appeal of the trustee in said matter, with the acceptance of service thereof.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said district, this fifth day of July, A. D. 1902.

[SEAL.] FRANK H. MASON, *Clerk.*

Stipulation for Costs.

(Filed in circuit court of appeals July 7, 1902.)

It is stipulated, subject to the approval of the court, that no costs shall be taxed in this appeal, each party to pay his own costs.

HARRY J. JAQUITH, *pro se.*
ARTHUR T. JOHNSON,
Attorney for G. Edwin Alden, Appellee.

11 *Proceedings in Circuit Court of Appeals.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1902.

HARRY J. JAQUITH, Trustee, Appellant,
v.
G. EDWIN ALDEN, Creditor, Appellee. } No. 444.

In the matter of F. N. Woodward *et al.*, bankrupts; *Ex parte* G. Edwin Alden, creditor.

Before Colt, Putnam, and Aldrich, JJ.

Opinion of Circuit Court of Appeals.

October 28, 1902.

Per Curiam:

On the facts of this case it is governed by *Dickson v. Wyman*, 111 Fed. Rep. 726, in which our opinion was passed down on November 15, 1901.

The decree of the district court is affirmed.

Final Decree in Circuit Court of Appeals.

October 28, 1902.

This cause came on to be heard October 22 and 23, 1902, upon the transcript of the record of the district court of the United States for the district of Massachusetts, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed as follows: The decree of the circuit court is affirmed.

By the court,

JOHN G. STETSON, *Clerk.*

12 *Petition for Appeal.*

(Presented in circuit court of appeals and filed November 6, 1902, and delivered to counsel for appellant. Refiled November 12, 1902, with the allowance of a justice of the Supreme Court of the United States indorsed thereon and his certificate attached thereto.)

To the honorable the justices of the Supreme Court of the United States:

And now comes Harry J. Jaquith, trustee in bankruptcy, and complains that manifest error hath happened to the great damage of your petitioner in the record and final judgment of this court on the allowance of the claim of G. Edwin Alden, a creditor of the bankrupt, said claim as allowed being for the sum of $546.89.

And your petitioner says that the decisions of the circuit court of appeals for the different circuits are not uniform but vary upon the

question of the right of the appellee to have his said claim allowed prior to the surrender of the preferential payments appearing in the record.

Wherefore your petitioner prays that he may be allowed to appeal to the Supreme Court of the United States to the end that said error may be corrected and full and speedy justice done in this behalf, and that a uniform construction of the bankruptcy act may be had.

13 And your petitioner files herewith an assignment of errors which sets out separately and particularly each error asserted and intended to be urged.

HARRY J. JAQUITH,
Trustee in Bankruptcy, Estate of F. N. Woodward & Co.

Nov. 10, 1902.

Allowed:
R. W. PECKHAM,
Associate Justice Supreme Court United States.

Certificate of Justice of the Supreme Court.

(Attached to petition for appeal, filed in circuit court of appeals November 6, 1902, and refiled November 12, 1902.)

I certify that in my opinion the determination of the questions involved in the allowance of the claim of G. Edwin Alden against the bankrupt estate of F. N. Woodward and Company is essential to a uniform construction of the bankruptcy act throughout the United States.

Nov. 10, 1902.

R. W. PECKHAM,
Justice of the Supreme Court of the United States.

14 *Assignment of Errors.*

(Presented in circuit court of appeals and filed November 6, 1902.)

To the honorable the justices of the Supreme Court of the United States:

And now comes Harry J. Jaquith, trustee in bankruptcy, and says that in the record and final judgment in the above-entitled proceedings there is error in this, to wit:

1. That the circuit court of appeals for the first circuit erroneously determined that the appellee's claim as set out in the record did not show a preference under the bankruptcy act which must be surrendered before the claim is allowed proof, and entered final judgment affirming the decree of the district court allowing said claim without surrendering the preferential payments.

2. That the final judgment entered allowed the appellee to set off credits given to the bankrupt without security, for property which became part of the debtor's estate, said credits having been given prior to the preferential payments.

3. That the final judgment entered erroneously decided that the question of preference under the bankruptcy act depended on whether on the date of the adjudication the appellee was owed more or less than was owed to him at a period exactly four months prior to the adjudication.

HARRY J. JAQUITH,
Trustee in Bankruptcy, Estate of F. N. Woodward & Co.

15 *Citation on Appeal to Supreme Court.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to G. Edwin Alden, of Wellesley, in the State and district of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal duly obtained from a decree of the United States circuit court of appeals for the first circuit wherein Harry J. Jaquith, as he is trustee in bankruptcy of the estate of Frederick W. Woodward *et al.* is appellant and you are appellee, said appeal having been allowed by the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt judge of the circuit court of the United States for the district of Massachusetts, this twelfth day of November, in the year of our Lord one thousand nine hundred and two.

LE BARON B. COLT,
Senior Circuit Judge, Presiding in said United States Circuit Court of Appeals for the First Circuit.

16 *Marshal's Return on Citation.*

UNITED STATES OF AMERICA, }
District of Massachusetts, } *ss:*

BOSTON, *Nov.* 26, 1902.

I hereby certify that on the 26th day of November, 1902, I served the within citation by giving to G. Edwin Alden in hand at Boston a true and attested copy thereof

Fees.

Service	2.00
Copy	.40
Travel	.12
	$2.52

BENJ. S. PICKERING,
Deputy United States Marshal.

17 United States Circuit Court of Appeals for the First Circuit, October Term, 1902.

HARRY J. JAQUITH, Trustee, Appellant,
v.
G. EDWIN ALDEN, Creditor, Appellee. } No. 444.

Clerk's Certificate.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the pages, numbered 1 to 10, inclusive, hereto prefixed, contain and are a true copy of the transcript of record of the district court of the United States for the district of Massachusetts in the cause entitled in said district court, No. 5451, in bankruptcy, *In re* F. N. Woodward *et al.*, bankrupts. *Ex parte* G. Edwin Alden, creditor.

I further certify that said cause was heard in said circuit court of appeals on October 22 and 23, 1902, upon said transcript of record of said district court.

I further certify that page numbered 11, hereto prefixed, contains and is a true copy of the opinion of the said circuit court of appeals announced on October 28, 1902, and of the final decree of said circuit court of appeals entered on October 28, 1902, in said cause.

I further certify that pages numbered 12, 13 and 14, hereto prefixed, are true copies of the petition for appeal, with the certificate of a justice of the Supreme Court annexed thereto, and of the assignment of errors, filed in said cause.

I further certify that pages 15 and 16, hereto prefixed, contain and are the original citation issued upon the appeal to the Supreme Court of the United States of said Harry J. Jaquith, trustee, appellant, in said circuit court of appeals, with the return of the marshal thereon.

I further certify that pages 1 to 16, hereto prefixed, contain and are a true copy of the record and all proceedings in said cause
18 determined in said circuit court of appeals.

Seal United States Circuit Court of Appeals, First Circuit.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston in said first circuit, this second day of December, A. D. 1902.

JOHN G. STETSON, *Clerk.*

Endorsed on cover: File No. 18,744. U. S. circuit court appeals, 1st circuit. Term No. 516. Harry J. Jaquith, trustee, appellant, *vs.* G. Edwin Alden. Filed December 9, 1902.

COPY.

FILED
JAN 12 1903
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 516.

HARRY J. JAQUITH, TRUSTEE, APPELLANT,

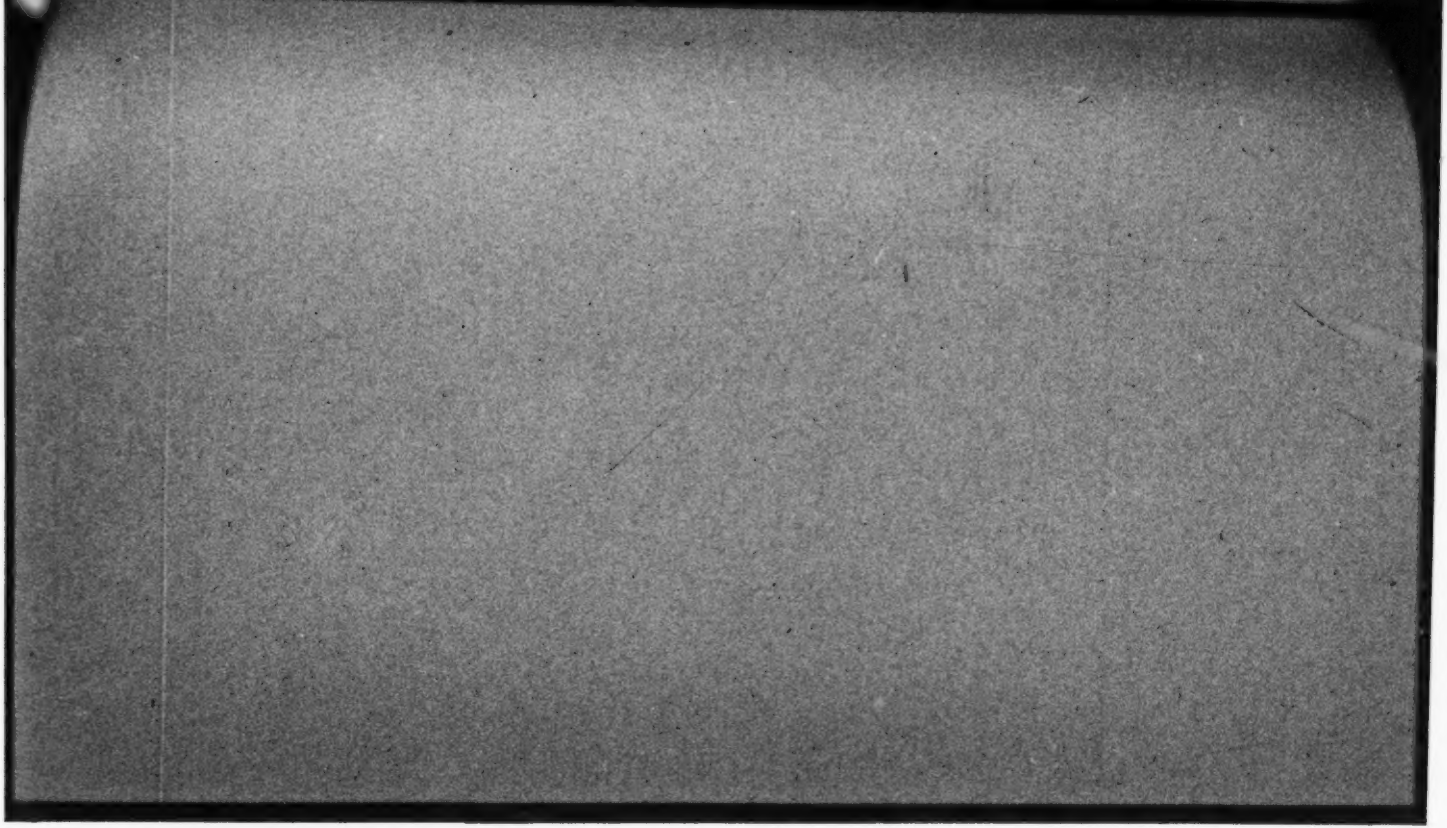
v.

G. EDWIN ALDEN, APPELLEE.

BRIEF FOR APPELLEE.

EUGENE M. JOHNSON,
ARTHUR T. JOHNSON,
ALONZO K. WEED,
Counsel for Appellee.

[illegible]



Supreme Court of the United States.

No. 516. October Term, 1902.

HARRY J. JAQUITH, Trustee, Appellant,

v.

G. EDWIN ALDEN, Appellee.

BRIEF FOR APPELLEE.

ARGUMENT.

I.

The Record, page 3, shows that all the transactions between the bankrupt and the appellee were after the occurrence of insolvency and within a period of four months prior to the adjudication. That the appellee was ignorant of the fact that the bankrupts were insolvent; that the sales were made and the payments received in the ordinary course of business, and without any intent to receive a preference on the part of the appellee; that the payments made were in each instance payments of single bills, and were made quite regularly, and also all the merchandise sold the bankrupts by the appellee was manufactured by them, and that the result of the transactions was to increase the estate which the bankrupts had at the time of the occurrence of insolvency.

II.

The appellee submits that the final judgment entered in the Circuit Court of Appeals was not "that the question of preference under the Bankruptcy Act depended upon whether on the date of the adjudication the appellee was owed more or less than was owed to him at a period exactly four months prior to the adjudication" as claimed in the appellant's third assignment of errors.

Record, page 11.

The Circuit Court of Appeals decided (Record, page 4) that the case was covered by the decision in Dickson *v.* Wyman, 111 Fed. Rep. 726.

In that case the Court said that whether the period of four months prior to the adjudication of bankruptcy, or the date of the actual occurrence of insolvency was taken into consideration, the net result of all the transactions between the creditor and the bankrupt was to increase the debt due the creditor and to correspondingly increase the bankrupt's estate, and therefore held that there was no preference.

In this case the insolvency occurred less than four months prior to the adjudication, that is, within the four-months period, the date of the occurrence of insolvency being Aug. 15, 1901, and the date of the adjudication being Nov. 26, 1901 (Record, page 3). Therefore there was no occasion for considering the beginning of the period of four months, but only the date of the occurrence of insolvency.

III.

The gist of the decision of the Circuit Court of Appeals in this case was that no preference, as defined in Sect. 60 (*a*) of the Act of 1898, was shown, and this is the first error assigned by the appellant. (Record, page 11.)

The appellee submits that this ruling was correct and that no preference was received by the appellee, and therefore that there was no occasion for the Court to consider Sect. 60 (*c*) of the Act of 1898, or any other sections referred to by the appellant.

The object of the Act "so far as the creditors are concerned is to secure equality of distribution among them of the property of the bankrupt, not among some of the creditors, but among all of them, which object could not be secured if there were no provisions against preferences."

Pirie *v.* Chicago Title & Trust Co., 182 U.S. 438–449.
Wilson *v.* City Bank, 17 Wall, 473.
Toof *v.* Martin, 13 Wall, 40–51.

The property which is to be distributed among the creditors is the property of which the bankrupt was possessed of at the date of the occurrence of insolvency.

The plain object and policy of an Insolvency Law is to require a debtor, as soon as he has reason to believe himself insolvent and before he has frittered away his property, to put himself and his assets at once into the hands of the law with the view to making an equal distribution of it among his creditors.

Fernald *v.* Gay, 12 Cush. 596.

From the moment of actual insolvency all creditors become entitled to share pro rata in the estate.

In re Knost 1 N.B.N. 403.

If this be so, then a creditor whose transactions are all had with the bankrupt after the date of the happening of insolvency, and consist of sales of merchandise which become a part of the estate of the bankrupt, is entitled to prove against the estate the amount which is due him at the time of the adjudication. He has not decreased the estate which the bankrupt had at the time of the insolvency; on the contrary, he has added to it property which is at least equal in value to the debt which he seeks to prove, and if he is allowed to prove he receives exactly the same proportion of his debt which the other creditors in his class receive. The result is not to give him a greater percentage of his debt than any other creditor of the same class, but exactly the same percentage.

A creditor to whom a debt is due at the time of the occurrence of insolvency, and to whom payments are made which are not balanced by corresponding unsecured credits given by him to the bankrupt, if he be allowed to prove without returning the payments received by him after the date of the occurrence of insolvency diminishes the estate which the bankrupt had upon the date of the occurrence of insolvency, and receives a greater proportion of his debt (if he receive the same dividend that other creditors in his class receive) than such other creditors in his class.

He receives, in other words, the dividend plus the payments which have been made to him after the occurrence of insolvency.

In such a case the object of the Act would be defeated were the transactions not held to be preferences.

A preference is an advantage secured by the creditor, the obtaining by the creditor of more than his share of the estate which the bankrupt had upon the date of the occurrence of insolvency.

In re Hapgood, Fed. Cas. 6044.

A creditor whose transactions are all after the occurrence of insolvency receives no advantage if the net result of his dealings with the bankrupt is to create a debt due from the bankrupt. In such a case the creditor has increased the estate at least by the amount of the payments received by him; therefore, if he proves his debt and receives a dividend, he receives only his *pro rata* share.

In this case the debt due the appellee, and which he is entitled to prove, is the debt due him at the time of the adjudication. He is entitled to the same percentage of this debt as any other creditor of the same class.

To illustrate: Suppose another creditor whose dealings with the bankrupt were exactly the same as those of the appellee, except that all of his sales and payments occurred prior to the date of insolvency. Suppose that the transactions between this imaginary creditor and the bankrupt resulted in a debt which exactly equalled in amount the debt which the appellee seeks to prove in this case, and was due to the imaginary creditor at the date of the actual occurrence of bankruptcy. Under the contention of the appellant such imaginary creditor might prove his claim, though the appellee may not.

There is no sound ground for any distinction between them on any theory. The appellee has contributed to the

estate which is to be divided among the creditors exactly the same amount and should receive the same dividend.

IV.

In order to support the contention of the appellant it is necessary for him to arbitrarily separate the account between the bankrupts and the appellee, and to arbitrarily assume that an amount which happened to be due to the appellee at one particular stage of the transactions between him and the bankrupts is the debt of the appellee within the meaning of the language of Sect. 60 (*a*) of the Act.

Appellant's Brief, page 7.

Such a construction of the Act is manifestly absurd and unjust, and would result in endless confusion.

In Kimball *v.* Rosenham, 114 Fed. Rep. 85–87, to a similar contention, the Court says: "It may be said that before the $850 was paid, the claim of the Rosenham Co. was about $2,728.13; that after its payment it was only $1,878.13, and that the moment the payment was made the creditor had secured thereby a preference. This would undoubtedly have been true if the account and the transaction had closed there. But it did not, and it is the actual account and the real transaction, and not those which might have been but were not, that condition this case and this decision."

V.

Whether or not the appellee shall be deemed to have received a preference which must be surrendered before he can prove his claim, depends upon the interpretation

of Sect. 60 (*a*) of the Act. That section provides that "a person shall be deemed to have given a preference if, *being insolvent*, he has procured or authorized a judgment to be entered against him in favor of any person, or *made a transfer of any of his property, and the effect of* the enforcement of *such* judgment or *transfer* will be to enable any one of his creditors to obtain a *greater percentage of his debt* than any other of such creditors of the same class."

This Court in the case of Pirie *v.* Chicago Title & Trust Co., 182 U.S. 438, determined (1) that a payment of money is a transfer of property within the meaning of this section of the Act; (2) that such payment is a preference irrespective of the intention with which it is given or received.

The Record in that case does not disclose any sales of merchandise made by the creditors to the bankrupts after the occurrence of actual insolvency and within the four months period, but simply the receipt of payments by the creditor from the bankrupt during that period by which the estate of the bankrupts was correspondingly diminished and the creditor thereby enabled to obtain a greater percentage of the debt due him at the beginning of the period than any other creditors of the same class to whom debts were then due and who received no such payments.

The appellee submits that the proposition contended for by him is in no way inconsistent with the opinion of this Court in that case. It is obvious that in that case, if the creditor was allowed to prove and to retain the payments received by him after the occurrence of insolvency and within the four months period, he would have received

a greater percentage of his debt than any other creditor of the same class.

If the record in that case had shown that after the occurrence of insolvency the creditor had made sales to the bankrupt equal to, or greater in amount than the payments received by him, so that the estate of the bankrupt had been in no way diminished, the appellee submits that in that case there would have been no preference.

VI.

The appellee submits that a study of certain other sections of the Act, to wit, of Sect. 3, which defines the acts of bankruptcy; of Sect. 60 (*b*) and (*c*) which provide for the recovery of preferences; of Sect. 67, Clauses (*c*) and (*e*), relative to liens; and of Sect. 68 (*c*) relative to set off; makes it clear that it was the purpose of the Act to fix the date of the occurrence of actual insolvency as the date by reference to which the rights of creditors to share in the distribution of the estate is to be determined. The plain purpose of the provisions for the surrender of innocent preferences before proof and the recovery of fraudulent preferences is to restore as far as practicable the conditions as they existed at the time of actual insolvency.

Lowell on Bankruptcy, Chap. 5 (relative to preferences).

Whether or not the inquiry as to the date of the occurrence of actual insolvency can be carried farther back than a date which is four months prior to the date of the adjudication is not raised by the record in this case, nor is it material. It may well be that considerations of convenience or public policy dictated the fixing of the

date four months prior to the filing of the petition as one back of which no inquiry shall be made, and perhaps under the provisions of the Act it is to be arbitrarily assumed that where the date of the insolvency cannot be fixed within the period of four months prior to the filing of the petition it shall be assumed to have occurred on a date which is just four months prior to the date of the filing of the petition. But where, as in this case, the actual date of the occurrence of insolvency is fixed within the period of four months, the appellee submits that it is the object of the Act to restore the estate as near as may be to the condition in which it was upon the date of the occurrence of insolvency, and to distribute that estate *pro rata* among the creditors who have claims against it upon the date of the adjudication of bankruptcy.

In the case at bar the rights of the creditors to share in the estate is to be determined as of the fifteenth day of August, 1901, when the bankrupts became insolvent. There was then no debt due the appellee. By reason of the transactions occurring thereafter between the bankrupts and the appellee, the estate of the bankrupts was increased to the extent of the amount of the debt which the appellee seeks to prove, and he is clearly entitled to his *pro rata* share of the debt which, as a result of all the transactions, was due him at the time of the adjudication.

VII.

The appellee respectfully submits that the appellant is in error in assuming that the sales of August 17 and August 28, amounting to $947.35, is the debt of the appellee within the meaning of Sect. 60 (*a*) of the Act,

and that without this assumption and also the acceptance of his proposition that a payment not for a present consideration is a preference, his argument and theory fails.

The appellee further submits that there is no question of set-off presented by this Record, and that no question of set-off under Sect. 60 (*c*) can arise until it is first determined whether or not there is a preference as defined in Sect. 60 (*a*).

It has been repeatedly decided by the several Circuit Courts of Appeal that, recognizing the authority of the Pirie case, that every payment made by an insolvent debtor to his creditor, within four months of the filing of the petition, is not necessarily a preference, unless taking all the transactions between the parties into account the payments, or some of them, enable the creditor to obtain a greater percentage of his debt than other creditors of the same class.

Dickson *v.* Wyman, 111 Fed. Rep. 726.
Kimball *v.* Rosenham, 114 Fed. Rep. 85.
Morey *v.* Shiffer, 114 Fed. Rep. 447.
Ganns *v.* Ellison, 114 Fed. Rep. 734.
Schwartz *v.* Fourth National Bank, 117 F. R. 1.
Schwartz *v.* Seegal, 117 F. R. 13.

VIII.

In regard to the second error assigned by the appellant, the appellee respectfully submits that for the reasons already fully set forth the Circuit Court of Appeals did not err in considering all of the transactions between the bankrupts and the appellee together in determining the effect of the payments received by the appellee upon his

debt, and that for the same reasons there were no "preferential payments" as claimed by the appellant.

IX.

In reply to certain statements made in the appellant's brief, the appellee respectfully submits the following:

(1.) That as already pointed out the decision in Dickson *v.* Wyman, *supra*, is not as claimed by the appellant that an innocently preferred creditor need not surrender his preference, but that in that case, as in this case, no preference was shown.

(2.) That as already pointed out the question whether inquiry as to the occurrence of insolvency may be extended back of a date more than four months prior to the filing of the petition does not arise in this case.

(3.) That the appellant's contention on page 7 of his brief that the payment of $644.28 on Oct. 29, 1901, was not a preference because a payment in full for a single prior unsecured credit applies with equal force to the payments of $289.46 on Sept. 4, 1901, and $657.89 on Sept. 28, 1901, each of which was in full for a prior unsecured credit. The Court in Dickson *v.* Wyman, *supra*, say in substance that it might be contended that, as each payment in that case was the payment of a single sale of merchandise, each credit and its payment constituted a single independent transaction, but that it is better to rest the decision on the broader ground, namely, that as the net result of all the transactions was to increase the indebtedness due the creditor and to correspondingly increase the estate which the bankrupt had at the occurrence of insolvency.

(4.) That as already pointed, the appellant's statements of the appellee's claim on pages 7 and 8 of his brief are arbitrary and artificially made for the purpose of his argument, and his argument is entirely based on the assumption that the payments of September 4 and 28 are preferences — while the appellee contends that this is the very question at issue.

(5.) That in the figures given at the bottom of page 9 of his brief, relative to possible dividends, the appellant does not take into consideration the condition of the estate at the date of the occurrence of insolvency, and arbitrarily assumes that the appellee's debt, upon the basis of which he is to be compared with other creditors of the same class, and his right to share in the estate determined, is $947.35.

(6.) That the appellant's analysis of the claim in the case of McKey *v.* Lee, on page 13 of his brief, is not justified by the reported decision in that case. There is nothing in the report of the case to show whether the payment of $500, made upon October 3, was made before or after the sale upon the same day.

EUGENE M. JOHNSON,
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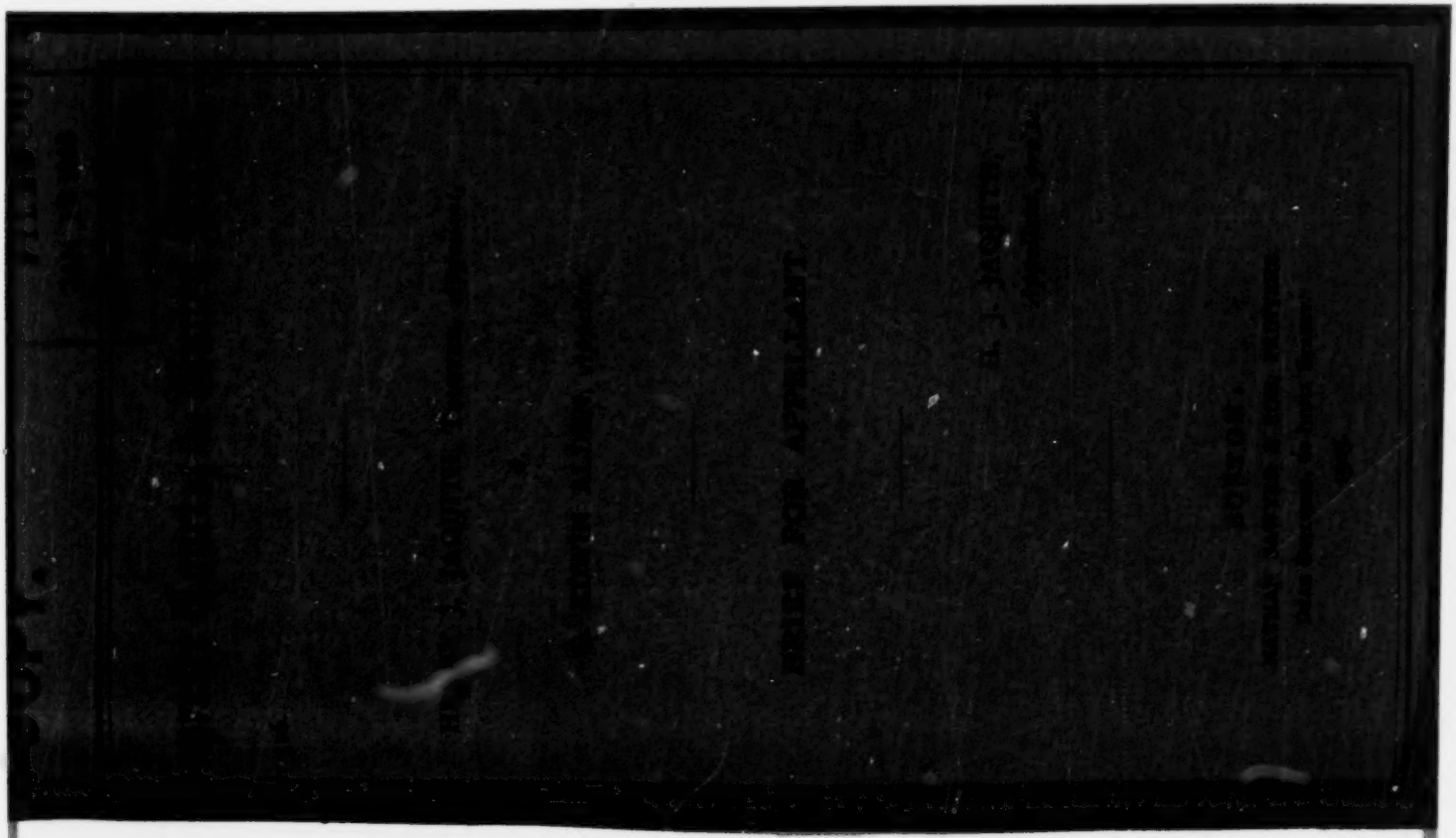
Counsel for Appellee.



Supreme Court of the United States.

No. 516.

HARRY J. JAQUITH, TRUSTEE, *Appellant*,

v.

G. EDWIN ALDEN, *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

THIS is an appeal from the Circuit Court of Appeals of the United States for the First Circuit.

The appellee is a creditor of the bankrupt firm of F. N. Woodward & Co. As such creditor, he asked the allowance of his claim against the bankrupts' estate in the sum of $546.89 (Record, pp. 1 and 2). Upon a hearing before the referee it was found that the appellee had, during the insolvency of the bankrupts, received from them cash payments within four months prior to the bankruptcy to the amount of $1,591.63 (Record, pp. 2–4). Of this sum $633.80 was found to be a preference and allowance of the appellee's claim was conditioned upon its surrender (Record, p. 4).

All of the transactions were in good faith and in the regular course of the appellee's business (Record, p. 3).

The appellee had the question certified to the District Judge who reversed the referee and ordered the allowance of the claim (Record, pp. 4 and 5).

The appellant is the trustee of the bankrupt estate, and duly petitioned for an appeal to the Circuit Court of Appeals, which was allowed by the District Judge (Record, p. 6).

The case was duly heard by the Circuit Court of Appeals for the First Circuit, and a final decree entered October 28, 1902, affirming the decree of the District Court (Record, p. 9). On November 6th the appellant filed his petition for an appeal to this Court, together with an assignment of errors. This petition was allowed November 10, 1902, by Mr. Justice Peckham who certified that a determination of the questions involved was essential to a uniform construction of the Bankruptcy Act throughout the United States (Record, pp. 9 and 10).

Jurisdiction.

The jurisdiction of this Court is established by the certificate of Mr. Justice Peckham (Record, p. 10), Bankruptcy Act, section 25 (*b*) 2.

Lack of Uniformity of Decisions.

There is lack of uniformity of decision by the Courts of Appeals of the various circuits upon two points involved in enforcing section 60 (*c*) and 57 (*g*) of the Bankruptcy Act, and both are material to the judgment of the Circuit Court of Appeals for the First Circuit in Dickson *v.* Wyman, 111 F. R. 726, which by the opinion of the Court below is made the ruling case and the foundation of the judgment against the appellant.

The first point to which the appellant calls the attention of the Court is that in Dickson *v.* Wyman the Court allows a creditor to set off against a preference a credit without security, for property which became a part of the bankrupt's estate, which credit was given after a date four months prior to the adjudication, without regard to whether the credit so set off was subsequent to the preferential payment or not.

A mere reading of the opinion in Dickson *v.* Wyman does not show the real decision, as it uses the words "subsequent transactions," but an examination of the papers in the case shows that those words mean transactions subsequent to August 13, 1899, — that is, four months prior to the bankruptcy; and it has been so applied in this case, and it is submitted that the case has been misunderstood by the Courts of Appeals of other circuits who have cited and approved it coupled with a statement that the credits to be set off are those subsequent to the preferential payment.

All of the other Courts of Appeals hold that the credit to be set off must be subsequent to the preferential payment.

McKay *v.* Lee, 105 F.R. 923 (7th).
Mills *v.* Lewis, 110 F.R. 512 (9th).
Peterson *v.* Nash, 112 F.R. 311 (8th).
A. Steers Lumber Co., 112 F.R. 406 (2d).
In re Stege, 116 F.R. 342 (2d).
Kahn *v.* Cone, 115 F.R. 290 (5th).
Kimball *v.* Rosenham, 114 F.R. 85 (8th).
McNair *v.* McIntyre, 113 F.R. 113 (4th).
Morey *v.* Schiffer, 114 F.R. 447 (8th).
Gans *v.* Ellison, 114 F.R. 734 (3d).
In re Harpke, 116 F.R. 295 (7th).
Swarts *v.* Bardk, 117 F.R. 1 (8th).
Swarts *v.* Siegel, 117 F.R. 13 (8th).

The other point to which the appellant calls the attention of the Court is that the Court of Appeals for the First Circuit has decided in Dickson *v.* Wyman that under section 57 (*g*) and 60 (*c*) of the Act an innocently preferred creditor is not required to surrender payments received during the bankrupts' insolvency more than four months prior to the adjudication in order to be entitled to share in the estate.

A contra decision has been rendered by the Court of Appeals for the Second Circuit in *In re* A. Steers Lumber Co., 112 F. R. 406, and in two cases reported in the District Courts.

It may be said that the record in this case does not justify considering that point, but it was considered by the Court below in the Dickson *v.* Wyman decision and was discussed at the hearing in this case, and is of great importance to the appellant in administering his trust under the Bankruptcy Act, as nearly one-third of the claims of creditors in this bankruptcy case of F. N. Woodward & Co. are suspended, awaiting the final determination of the issues involved in this appeal; and so long as there are contra decisions by two or more eminent courts uncertainty will exist and injustice perhaps be done until this Court declares the law.

It seems to the appellant that the Act adopts four months as a limitation barring all inquiry into transactions untainted with fraud, or which are not void under local law (section 67 (*e*) or which are not repugnant to local re-enactments of the Statutes of Elizabeth relating to fraudulent conveyances (section 70 (*e*).

It seems that this view is supported by a consideration of the purposes of the Act and by reading the following sections:–

Sect. 3 (*a*) 2.
Sect. 3 (*b*).
Sect. 57 (*g*).
Sect. 60 (*a*, *b*, *c*).
Sect. 67 (*c*, *e*, *f*).
Sect. 68 (*b*).

An examination of forty-eight reported cases involving preferences has shown only seven where the report states insolvency or preferential payments more than four months prior to the adjudication.

In *In re* Gaylord (113 F. R. 131) the insolvency dated back nine months; only the items within four months are considered.

In Kimball *v.* Roseham (114 F. R. 85) the report does not state the date of the insolvency, but the Court considers the surrender of preferences dating back more than four months, but as the subsequent credits more than balanced all the preferences the question of limitation was not discussed. In C. S. Morey *v.* Schiffer (114 F. R. 447) the dealings covered some months prior to the adjudication but the Court marshalled only those within four months in determining the question of preference.

In *In re* Bullock (116 F. R. 667) the Court distinctly passed upon the question and ruled that preferences innocently accepted more than four months prior to the adjudication need not be surrendered in order to prove a claim.

Opposed to this view are three reported decisions —

In re Jones, 110 F.R. 736;
In re A. Steers Lumber Co., 110 F.R. 738;
In re A. Steers Lumber Co., 112 F.R. 406 (C.C.A.);

— the Court in the second case saying, "The Court is constrained to the conclusion that there is no time limit to the operation of section 60 (*a*)."

Argument.

I.

The first error assigned is —

1. That the Circuit Court of Appeals for the First Circuit erroneously determined that the appellee's claim as set out in the record did not show a preference under the Bankruptcy Act, which must be surrendered before the claim is allowed proof, and entered final judgment affirming the decree of the District Court allowing said claim without surrendering the preferential payments.

The case was heard by the District Judge on the referee's certificate (Record, p. 5), there being no dispute as to its statement of facts.

The language of the Bankruptcy Act is: "SECT. 60. *Preferred Creditors.* — (*a*) A person shall be deemed to have given a preference, if, being insolvent, he has . . . made a transfer of any of his property, and the effect of . . . such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"(*c*) If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

"SECT. 57. (*g*) The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

These sections were construed by this Court in Pirie *v.* Chicago Trust Co., 182 U.S. 438, and it was determined —

(*a*) That a payment of money is a transfer of property (p. 443).

(*b*) That if the payment will result in giving one creditor a greater percentage than another it is a preference (p. 446).

(*c*) That the innocence of the creditor does not prevent the transfer being a preference (p. 446).

(*d*) That such a preference must be surrendered before allowance of a claim (p. 456).

(*e*) That an intent on the part of the bankrupt to prefer is not necessary (p. 454).

(*f*) That a set-off of subsequent credits might not have been allowed but for section 60 (*c*) (p. 455.).

If we follow the language of section 60 (*c*) of the Act with exactness, and apply it to the case at bar, we have this result (see Record, p. 3):—

Appellee's credit to the bankrupts	Aug. 17, 1901	$289.46
" " "	" 28, "	657.89
		$947.35

The bankrupts became insolvent about August 15, 1901, and while insolvent, on September 4, 1901, made a payment to the appellee of $289.46, and on September 28, 1901, a further payment of $657.89, a total of $947.35, which diminished the bankrupts' assets and gave to the appellee a larger percentage than other unsecured creditors could receive from his estate, and was a preference (see section 60 (*a*) of Act).

On September 30, 1901, the appellee gave a new credit without security of $644.28, the merchandise becoming a part of the bankrupt estate; but as that credit was paid for in full October 29, 1901, it cannot be set off to reduce the preference (section 60 (*c*) of Act), and that payment does not constitute a preference, the general construction under section 60 (*c*) being that the new credit and its payment are to be regarded as one transaction, leaving the original preference unaffected if the new credit given is paid in full, the language of the section being that so much of the new credit as remains unpaid may be set off against the prior preference.

Peterson *v.* Nash, 112 F.R. 311 (C.C.A. 8th).
Kahn *v.* Cone Co., 115 F.R. 290 (C.C.A. 5th).
Kimball *v.* Rosenham, 114 F.R. 85 (C.C.A. 8th).
Morey *v.* Schiffer, 114 F.R. 447 (C.C.A. 8th).
Gans *v.* Ellison, 114 F.R. 734 (C.C.A. 3d).
McNair *v.* McIntyre, 113 F.R. 113 (C.C.A. 4th).

Following the language of section 60 (*c*) we find that the only unsecured credits given after these preferential payments of

$947.35, and which became assets of the estate and remained unpaid at the time of the adjudication, were —

October 18, 1901	$535.99
" 18, "	.50
" 21, "	10.40
	$546.89

Deducting this sum from the preferential payments of $947.35, we have a remainder of $400.46, which should be surrendered by the appellee as a condition precedent to his proving his claim for the correct sum of $947.35, — the amount of the debt due to him on which the preferential payments were made.

It may be stated as follows: —

Date of adjudication, November 26, 1901.
Date of actual insolvency, August 15, 1901.

1901.				
Sept. 4.	Preferential payment			$289.46
" 28.	" "			657.89
				$947.35
Sept. 30.	New credit	$644.28		
	Paid Oct. 29	644.28		
	No set-off.			
Oct. 18.	New credit	$535.99		
" 18.	" "	.50		
" 21.	" "	10.40		
	Total set-off			546.89
	Net preference			$400.46

When this is surrendered the provable claim will be —

Claim offered for proof	$546.89
Preference surrendered	400.46
Total	$947.35

— being the amount originally owed the creditor when the preferential payments began.

It is of just this situation that this Court spoke in Pirie *v.* Trust Co., 182 U.S. 438, 447, when it said: "There is certainly no ambiguity so far. What a preference is, is plain. What the effect of it is, if taken under the conditions mentioned, is equally plain. So taken, it may be recovered back; if not so taken, it may be kept or surrendered. Unless surrendered, he who received it cannot prove his debt or other debts."

Have the payments of $289.46 and $657.89 on the 4th and 28th of September, 1901, the earmarks of a preference as described by section 60 (*a*) of the Bankruptcy Act?

These earmarks are two: (*a*) *a transfer of the bankrupts' property*, — it is conceded that the payments were from the bankrupts' estate; (*b*) *that the transfer will result in giving to a creditor a greater percentage on his debt than other creditors of the same class will receive.*

The appellee is an unsecured creditor (Record, p. 2,) and, while the record is silent as to the exact condition of the estate, its assets and liabilities, — having been adjudicated bankrupts, it is a presumption of law that the estate will not pay one hundred cents on the dollar to the unsecured creditors, who are the lowest class in the sharing of assets.

Within the insolvent period the bankrupts owed the appellee $947.35; at the time of the adjudication the bankrupts owed the appellee $546.89; under any method of stating it, or on any percentage short of one hundred per cent., the appellee has received and will receive more on his original debt of $947.35 than another unsecured creditor for the same amount will receive; to illustrate: —

Appellee.		*Other Unsecured Creditor.*	
Original debt	$947.35	Original debt	$947.35
Offered for allowance .	546.89	Offered for allowance .	947.35
Dividend 99% . . .	$541.42	Dividend 99%, total received	937.88
Preferential payment .	400.46		
Total received . . .	$941.88		

— which shows that even if the estate paid ninety-nine per cent. that the transfer to the appellee has resulted in giving him a larger percentage on his debt than other creditors of the same class would receive. The estate has so far paid a dividend of ten per cent., and on that basis the difference works out as follows: —

Appellee.		*Other Unsecured Creditor.*	
Original debt	$947.35	Original debt	$947.35
Offered for allowance .	546.89	Offered for allowance .	947.35
Dividend 10%	54.69	Dividend 10%, total received	94.73
Preferential payment .	404.46		
Total received . . .	$459.15		

It is respectfully submitted that the record shows a preference under the Bankruptcy Act, which the appellee should surrender.

II.

The second and third errors assigned are —

2. That the final judgment entered allowed the appellee to set off credits given to the bankrupt without security, for property which became part of the debtor's estate, said credits having been given prior to the preferential payments.

3. That the final judgment entered erroneously decided that the question of preference under the Bankruptcy Act depended on whether on the date of the adjudication the appellee was owed more or less than was owed to him at a period exactly four months prior to the adjudication.

The District Judge in his opinion followed the law as laid down by the Court of Appeals for the First Circuit, citing *In re* Dickson (111 F. R. 726), the language of the Court in that case being: "In order to avoid so unreasonable a result, we may say that all the transactions covered by the account current should be regarded as one" (p. 728).

This Court has said that there is no ambiguity in section 60 (*a*, *b*, *c*), or in section 57 (*g*) of the Bankruptcy Act; it has also said concerning the construction of constitutions and statutes that "If the words convey a definite meaning which involves no uncertainty nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

Lake County *v.* Rollins, 130 U.S. 652, 670.

Section 60 (*c*) distinctly makes a preferred creditor's right to set off a credit to depend on whether the credit was subsequent to the preference, and this is incompatible with a construction of all transactions in an account as one. This Court has distinctly divided the transactions by saying "debt or other debts."

Pirie *v.* Chicago Trust Co., 182 U.S. 438, 447.

Under the Bankruptcy Act of 1867 this Court was asked to find in that Act what Congress did not put there. The Court in its opinion said: "The statute is clear and imperative. Its constitutional validity is not questioned. It contains no qualification. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is

our business to execute the law as we find it and not to make or modify it."

Bank *v.* Sherman, 101 U.S. 403, 406.

Congress has enacted that if any creditor would share equally in the fund brought into court he must put himself on the level of all who are permitted to participate by giving up such property as he received from the bankrupt during his insolvency, when the effect of the retention of that property would be a larger percentage on his dealings with the bankrupt than other sharers in the fund would get; this is equitable equality enacted into statute law, and is the purpose of all bankruptcy legislation.

Bank *v.* Sherman, 101 U.S. 403, 406.

A review, in their order, of all the decisions upon these points by the Circuit Courts of Appeal of the United States would seem profitable, and especially upon the point as to what may be set off, for the decision of this Court in the Pirie case determined the two preliminary points necessary to be settled in this case, viz.: that there has been a preference, and that if there is no set-off it must be surrendered if the creditor would share in the estate.

In the Fixen case (102 F. R. 295), whose reasoning has the approval of this Court, the opinion states that a preference under section 60 (*a*) bars a proof, unless surrendered under section 57 (*g*) (p. 297). The question of set-off is not discussed, and on that point the valuable part of the opinion is its continual reiteration of the principle that real and effectual equality is the fundamental aim of the Act (pp. 297 and 298).

The next decision by a Circuit Court of Appeals was in the Seventh Circuit, McKey *v.* Lee, 105 F. R. 923. In that case the conclusion reached by the District Judge (p. 925) is as follows: —

1899.				
Sept. 17.	Credit to bankrupt			$874.52
" 23.	" "			93.84
" 23.	" "			1,050.10
" 23.	" "			112.50
" 25.	" "			184.00
" 28.	" "			196.68
" 28.	" "			35.61
" 28.	" "			23.05
	Total unsecured credit . . .			$2,570.30
Oct. 3.	Preferential payment . .	$500.00		
	Subsequent credit . . .	423.25		
	Net preference . . .	$76.75		
Oct. 18.	Preferential payment . .	334.56		
		$411.31		
Oct. 21.	Subsequent credit . . .	231.25		
	Net preference . . .	$180.06		
Dec. 1.	Subsequent credit . . .	54.00		
		$126.06		
Dec. 2.	Subsequent credit . . .	210.25		
	Further credit extended . . .			84.19
				$2,654.49
Dec. 22.	Preferential payment $500 (no subsequent credit), which was ordered surrendered.			

The Appeals Court held that section 60 (*c*) was applicable to the case of payments received in good faith by the creditors (p. 925), and the finding of the District Judge ordering the repayment of the preferential payment of $500 was affirmed.

Following the case of McKey *v.* Lee, in point of time, came Pirie *v.* Trust Co., 182 U.S. 438.

The Circuit Court of Appeals for the Ninth Circuit was the next Appeals Court to pass on the question, in Mills *v.* Lewis, 110 F. R. 512 (filed August 19, 1901). In that case the contention was squarely the same as that raised by the appellee in this case and was decided by the Circuit Court of Appeals squarely contra to the decision of the Circuit Court of Appeals in this case. The appellants, in Mills *v.* Lewis, sought to prove a claim for $1,138.29, but were ordered by the District Judge to surrender $288.60 paid them during insolvency. From this decision an appeal was taken, and to show the error the creditors relied upon prior credits given by them by which they showed that, taking the whole term of four months into account, the bankrupt estate had been enriched and not diminished, and hence argued that the payment was not a preference (p. 513). Of this claim the Court said (MORROW, J): "This claim on the part of the creditor is without foundation. The statute declares when a payment made by a bankrupt shall be deemed a preference. The state of the account between the debtor and the creditor at the time the payment is made has nothing to do with its character as a preferential payment."

The order of the District Judge was affirmed, negativing the claim that prior credits could be relied upon to set off a preferential payment.

Following this decision came the decision of the Circuit Court of Appeals for the Eighth Circuit, in Peterson *v.* Nash, 112 F. R. 311 (filed November 4, 1901). In that case the creditor sought to prove a debt of $3,058.29. The trustee prayed the surrender of $2,701.10 of payments received by the creditor during the insolvency. The creditor replied, showing *subsequent* credits given the bankrupt to the amount of $4,313.20 (p. 312). The District Judge ordered the claim allowed without any surrender; the trustee appealed, and the Appeals Court affirmed the order of the District Judge, using the identical illus-

tration used by the Circuit Court of Appeals for the First Circuit in its opinion filed eleven days later in *In re* Dickson. The Court said (p. 314): "The giving and receiving under such circumstances may properly enough be regarded as one transaction, resulting not in a preferential payment to the creditor, but, in reality, in the creation of an indebtedness in favor of the creditor for the difference between the two." It is to be noted that these words followed other words in which the Court found that section 60 (*c*) was applicable, not only to preferences under section 60 (*b*), but also to preferences received in good faith; and after that finding under the statute the Court discussed the general equity of the section, and then used the words quoted.

There is nowhere any intimation that the statutory requisite, that the credit, to be set off, must be subsequent, can be dispensed with, or that prior credits will avail in set-off.

After this decision in point of time the Court of Appeals for the First Circuit filed its opinion in *In re* Dickson (111 F. R. 726). Also cited as Dickson *v.* Wyman.

A query that forces itself upon the mind in considering *In re* Dickson, is, If the Court decided the question of set-off upon purely equitable grounds, and outside of the statute enacted in section 60 (*c*), where did the Court get the four months' limitation upon preferences that must be surrendered? Surely not in the general equity law, but in section 60 (*b*), which deals with fraudulent preferences; and if section 60 (*b*) applies equally, or furnishes a rule equally for preferences taken in good faith, then surely it is no stretch of construction to construe section 60 (*c*) as furnishing a rule for both fraudulent and innocent preferences; this position has been taken by every other Circuit Court of Appeals in the United States, except in the Sixth Circuit, no cases being reported from that circuit.

A consideration of the full account in *In re* Dickson, as filed in Court, showed two preferential payments: $562.73 and $456.82; thereafter every payment received was to balance a

new credit given, and was not a preference under the Act. On November 20th and December 11th there were two small preferences, $28.14 and $60.78, which, including above, make a total of $1,108.47.

As a set-off to this sum the creditor, after September 22d, gave new credits, without security, to the amount of $2,263.12, and manifestly there was no preference to be surrendered. If, however, a four months' limit is introduced, the preferential payments increase to $3,042.05, while the subsequent credits remain $2,263.12, and under the rule adopted in all other circuits there would be an unsatisfied preference of $778.93. This change is due to the fact that if the preferential payments begin September 5th, the number and amount of the subsequent credits are diminished.

It is an axiom in administering the law that no rule can be established which will not bear hard, and in a certain sense unjustly, upon some who are affected by it, and this is especially true of bankruptcy laws.

In the case of Dickson it was a hardship to enforce the consequences of a four months' limitation. For the creditor the whole term of the insolvency would have given more favorable results, but not so with most bankruptcies. It not infrequently happens that firms in good credit, yet bankrupt, do business for years before the crash comes, and it would be intolerable to open up such dealings years back as a prerequisite to allowing a claim. Equally: a rule that if a claim offered for proof was as large, or larger, than the claim existing four months prior to the adjudication, such claim should be allowed, would be intolerable, and would negative the purpose of the Act to insure an equitable distribution of the estate, as of the date of the adjudication, plus preferential transfers. Under such a rule, if A was owed nothing four months prior to adjudication he could accept payment of ninety per cent. and prove for ten per cent. of his subsequent dealings. It would seem that the same rule of computing a preference must be adopted, whether it be fraudulent

or innocent, for Congress has established the penalty and the Courts may not increase it, nor may they establish one rule of computation to protect one creditor, and another to punish a second creditor; again we may test the rule as construed by the Court of Appeals for the First Circuit by its operation, and inquire under what circumstances could a creditor taking a preference under section 60 (*b*) be held to return it if he was owed nothing four months before the adjudication, or left unpaid the same or a slightly greater balance due him than was due him four months before the adjudication?

The next opinion was filed by the Circuit Court of Appeals for the Second Circuit in *In re* A. Steers Lumber Co. 112 F.R. 406, which affirmed the decision of the District Judge and held that payments received in good faith more than four months prior to the adjudication, but during insolvency, must be surrendered as a preference before proving a subsequent credit. This decision is contra to all of the other Circuit Court of Appeals decisions.

Following in point of time is the decision of the Court of Appeals for the Fourth Circuit, in McNair *v.* McIntyre, 113 F. R. 113 (February 4, 1902) the opinion holding that preference within four months may be surrendered or retained at the creditor's option if the preference be innocently taken, but if retained all claim against the estate is lost.

The same Court, in an opinion filed March 4, 1902, in *In re* Stege (116 F. R. 342), passed upon the construction of section 60 (*a*) and, as there was no subsequent credit given, section 60 (*c*) was not discussed. Certainly a fair deduction to be drawn from the opinion is that the Court never considered the possibility of an argument that a prior credit could be set off to balance a preference, inasmuch as the facts stated showed banking transactions extending through the four months prior to the adjudication.

In the Fifth Circuit the Circuit Court of Appeals, by a majority decision and without an extended opinion, decided in the case

of Kahn *v.* Cone Co. (115 F. R. 290, filed March 15, 1902) that new credits might be deducted from preferential payments in determining the amount to be surrendered before allowance of claim. This opinion supports the appellant's contention, as he claims only the surrender of the balance of the preferential payments after all subsequent credits which remain unpaid have been deducted.

The Circuit Court of Appeals for the Eighth Circuit, in a very careful and able opinion by Judge Sanborn in Kimball *v.* Rosenham (114 F. R. 85, filed March 24, 1902), cited and approved *In re* Dickson as he understood it and reached the conclusion that the appellant contends for in this case. The facts in that case showed that within the period of insolvency the creditor had received preferential payments to the amount of $850, and that thereafter he had given the bankrupt new credits to the amount of $1,506, which formed a part of a total claim of $3,384.13 which the creditor offered for proof. The District Judge separated the account into two debts and allowed the $1,506, but as to the earlier portion of the claim he ruled that that could not be proved until the $850 was surrendered (p. 86).

The reasoning of the Court seems uncontrovertible, and on page 88 the Court says: "The entire account is not only one single claim, but it is one single continuing transaction, and in determining the existence of the alleged preferences, and in allowing its proof, it must be so considered. *In re Richter, 20 Fed. Cas. No. 11803; In re Dickson, 111 F. R. 726, 728.* If when the claim is thus considered, the payments made, and the *new* credits which *follow* them decrease the amount owing upon the claim, they may constitute a preference to the creditor; but if they increase it or leave it unaffected it is impossible for them to work such a 'preference' in his favor within the true meaning of that term in the bankrupt law."

The Court thereupon reversed the decision of the District Judge and ordered the allowance of the claim without any surrender of payments.

This is the appellant's contention in this case; and as the appellee cannot show new credits sufficient to set off the preferential payments, he contends that the balance, after the allowance of the set-off of subsequent credits, should be surrendered.

On the same day that the opinion was handed down in Kimball *v.* Rosenham the same Court handed down the opinion in Morey *v.* Schiffer, 114 F. R. 447. In that case during the insolvency the creditor received payments amounting to $221.26, and *subsequently* extended an unsecured credit of $444.03. The District Judge ordered the $221.26 to be surrendered before the claim would be allowed (p. 448).

The Court of Appeals cited *In re* Dickson, approved it, and, upon the same reasoning as in the Kimball *v.* Rosenham case, reversed the decision of the District Judge, and ordered the claim allowed without any surrender (pp. 449 and 450).

The next decision upon this question by the Appeals Court was made April 22, 1902, in the Third Circuit, in the case of Gans *v* Ellison, 114 F. R. 734.

The facts in that case are that during the insolvency the creditor received payments amounting to $1,800 and subsequently gave an unsecured credit of $1,703.15, upon the adjudication the creditor tendered $96.82, the net difference between the payments and the new credit, and offered his full claim for allowance, this allowance was ordered and the trustee appealed, claiming the surrender of the entire $1,800 (p. 735). The Court, by Judge Acheson, cites *In re* Dickson, as he understood it, approves it and affirms the order of the Court.

This case is an especially strong one for the appellant's contention, inasmuch as the total claim of the creditor was $6,671.89, and had the theory been entertained that prior as well as subsequent credits might be used to set off against preferences no tender or payment by the creditor would have been necessary. In the same opinion the Court disposes of Gans *v.* Harrington & Goodman, the facts being the counter-

part of the facts in Kimball *v.* Roseham, and the decision being the same as that reached by the Appeals Court of the Eighth Circuit in that case.

The next case involving a preference determined by an Appeals Court is *In re* Harpke (116 F. R. 295, filed May 6, 1902); that case was in the Seventh Circuit and did not involve a construction of section 60 (*c*). The Court found that the facts set out did not constitute a preference within section 60 (*a*) and disposed of the case on that ground. The facts set out showed a payment of a note by an endorser with funds supplied by the bankrupt, the creditor not knowing the source of the funds used to make the payment, — held not a preferential payment to the payee.

July 21, 1902, the Circuit Court of Appeals for the Eighth Circuit filed opinions in Swarts *v.* Fourth National Bank (117 F.R. 1) and Swarts *v.* Siegel (117 F. R. 13) in which the Court followed its ruling in Kimball *v.* Rosenham *supra*.

III.

It is submitted that the appellant's contentions are supported by the general provisions of the Act relating to set-off found in section 68.

That section provides — 68 (*a*)—

(*a*) That mutual debts may be set off.

(*b*) That mutual credits may be set off.

But there is no provision that mutual debts *and* credits may be set off; this would prevent any transfer being a preference.

Section 68 (*b*) provides: —

68 (*b*) 1. That no set-off or counter claim shall be allowed which is not provable against the estate: hence a debt that could not be proved because of a preference cannot be allowed in set-off except under the terms of section 60 (*c*).

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This is made especially clear by section 68 (*b*) 2, which allows proof of assigned claims innocently acquired within four months of the bankruptcy, yet such claims are barred as a set-off against a preference by section 60 (*c*).

The appellant, in discussing the points involved in this case, has endeavored to "plumb" his contentions with the provisions of the law enacted, and has not considered whether or not such provisions were what equity would award, — relying upon that equitable maxim, "Equity follows the law."

In closing, the appellant would respectfully call the attention of the Court to three simple propositions which seem to him certainly deducible from the facts and opinions appearing in the cases cited, and heretofore discussed. If these propositions be conceded he feels that his contention in this appeal will be sustained: —

1. That a payment not for a present consideration is a preference.

2. That only a subsequent credit can operate to discharge a preference.

Bankruptcy Act, section 60 (*c*).

3. That the term "new credit" has reference to a credit given after a preferential payment and not to one given after the commencement of the period of four months prior to the adjudication merely.

It has seemed that much of the confusion of the bar on the matter of preferences and set-off was due to incorrect methods of stating the transactions; as stated in Mills *v.* Lewis, 110 F. R. 502, the condition of the account when the payment is made has nothing to do with determining the question of preference and set-off. The fact of insolvency having been deter-

mined, a transfer of property becomes a preference, and the question of set-off is determined by a search for subsequent unpaid, unsecured new credits for property which became a part of the bankrupt estate.

That this is true a consideration of the Act will show.

Section 60 (*c*) uses the word "recoverable," now the appellant as trustee seeking to recover from the appellee, assuming that the transfer was with knowledge of the insolvency on the part of the appellee, would sue upon the following statement: —

1901.		
Sept. 4.	Cash paid in fraud of law . . .	$289.46
Sept. 28.	" " " " " " . . .	657.89
Oct. 29.	" " " " " " . . .	644.28
		$1,591.63

It would then be the appellee's part to plead in set-off, subsequent credits, given without security, for property which became part of the estate and which remained wholly or partially unpaid at the date of adjudication.

Now all of the credits prior to the date of the preferential payment on September 4, 1901, are barred by the language of the statute, so the appellee would first show that the last payment on October 29, 1901, was to pay for a further credit extended after the two former preferential payments. The law does not require or treat the preferential payment and the subsequent credit as one transaction, but it does regard the new credit and its payment as concurrent, and as not in any sense chargeable as a preference, for while a claim cannot be proved until a preference has been surrendered, a set-off may be proved and the partial payment on it retained (section 60 (*c*).

After the appellee had thus withdrawn the payment of $644.28, on October 29th, from the list of preferences, he would then set off the credits of October 18th and 21st, amounting to $546.89 and

the appellant would recover $400.46, — the balance of the preferential payments not covered by the set-off.

Just as the fact of the transfer increasing the creditor's percentage stamps the transfer as a preference so the enrichment of the estate determines the question of set-off; but there is a marked confusion of these two distinctions in the appellee's case: it is argued that there can be no preference if there is an enrichment of the estate, but the law and this Court unite in saying that it is the benefit to the creditor which determines the question of preference; the enrichment of the estate only becomes a factor when a claim of set-off is made.

It is respectfully submitted that, divergent as some of the earlier decisions may have been, later decisions have crystallized substantially on these points, and the weight of authority is with such later view, though strong reasons may appeal for a contra decision; yet if such reasons are carefully examined they will be found to be such as should appeal to the law-making power rather than to the co-ordinate branch of government which enforces the law as made.

The appellant respectfully submits that the terms of the Act require that the decision of the Court of Appeals should be reversed, and that the appellee should surrender his preference or his claim should be refused allowance.

H. J. JAQUITH,
Appellant, pro se.

Supreme Court of the United States.

No. 516.—October Term, 1902.

Henry J. Jaquith, Trustee, Appellant, vs. G. Edwin Alden. } Appeal from the United States Circuit Court of Appeals for the First Circuit.

[April 27, 1903.]

F. N. Woodward *et al.* filed their petition in bankruptcy and were adjudicated bankrupts November 26, 1901. They had become insolvent August 15, and on that day were not indebted to G. Edwin Alden, who, afterwards, in ignorance of the insolvency, made sales to Woodward *et al.* and received payments from them therefor in the regular course of business, and without any idea or intention on the part of Alden of obtaining a preference thereby, the sales and payments being as follows:

Sales.

"Aug. 17, 1901.	Rubber	$289	46
28, "	"	657	89
Sept. 30, "	"	644	28
Oct. 18, "	"	535	99
Oct. 18, "	Cartage		50
31, "	Asbestine	10	40"

Payments.

"Sept. 4, 1901.	Payment of bill Aug. 17	$289	46
28, "	" " " 28	657	89
Oct. 29, "	" " " Sept. 30	644	28"

The merchandise sold Woodward *et al.* was manufactured by them, and the result of the transactions was to increase their estate in value. Alden petitioned to be allowed to prove his claim of $546.89.

The referee disallowed the claim unless at least the amount of $633.88 was surrendered to the estate. The District Judge reversed the judgment of the referee and allowed the claim, and the decree of the District Court was affirmed by the Circuit Court of Appeals, 118 Fed. Rep. 270, on the authority of *Dickson* v. *Wyman*, 111 Fed. Rep. 726. Thereupon an appeal to this court was allowed and a certificate granted under section 25, *b*, 2.

Mr. Chief Justice Fuller delivered the opinion of the Court:

The facts found established that on August 15 the aggregate of the property of the bankrupts was not, at a fair valuation, sufficient in amount to pay their debts, but that Alden was ignorant of this, and in good faith and in the regular course of business sold material to the bankrupts, and received

payment therefor, several times between August 15 and November 26, when the petition was filed, on which day the amount of $546.89 for material delivered shortly before had not been paid. All the material so sold to them was manufactured by the bankrupts and increased their estate in value.

The question is whether the payments made to Alden (or either of them) were preferences within section 60 of the bankruptcy act of 1898, which must be surrendered under section 57*g*, before his claim could be allowed.

Provisions of the act bearing on the subject are given below.*

In *Pirie* v. *Chicago Title & Trust Company*, 182 U. S. 438, the Circuit Court of Appeals for the Seventh Circuit had affirmed an order of the District Court for the Northern District of Illinois, rejecting a claim of Carson, Pirie and Company against the estate of Frank Brothers, bankrupts, and the case was then brought to this court on findings of fact and conclusions of law of the Circuit Court of Appeals made and filed "pursuant to the requirements of subdivision 3, Rule 36 of General Orders in Bankruptcy." The three first of the findings were as follows:

"First. That on February 11, 1899, August Frank, Joseph Frank and Louis Frank, trading as Frank Brothers, were duly adjudged bankrupts.

"Second. That for a long time prior thereto appellants carried on dealings with the said bankrupt firm, said dealings consisting of a sale by said appellants to said Frank Brothers of goods, wares and merchandise amounting to the total sum of $4,403.77.

"Third. That said appellants in the regular and ordinary course of business, and within four months prior to the adjudication in bankruptcy

*"SECTION 1*a*. The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: . . . (9) 'creditor' shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) 'date of bankruptcy,' or 'time of bankruptcy,' or 'commencement of proceedings,' or 'bankruptcy,' with reference to time, shall mean the date when the petition was filed; (11) 'debt' shall include any debt, demand, or claim provable in bankruptcy; . . . (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

"SEC. 3*a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his

herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares and merchandise so sold and delivered to said Frank Brothers, the sum of $1,336.79, leaving a balance due, owing and unpaid, amounting to $3,093.98."

It was further found that at the time this payment was made Frank Brothers were hopelessly insolvent to their knowledge; but that Carson, Pirie and Company had no knowledge of such insolvency nor had reasonable cause to believe that it existed, nor did they have reasonable cause to believe that the bankrupts by the payment intended thereby to give a preference; and that they had refused to surrender to the trustee the amount of the payment made to them by the bankrupts as a condition of the allowance of their claim. Upon the facts the Circuit Court of Appeals concluded as matter of law that the payment made "at the time and in the manner above shown," constituted a preference, and that by reason of the failure and refusal of Carson, Pirie and Company to surrender the preference they were not entitled to prove their claim.

The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within section 60*a*, although the creditor was ignorant of the insolvency and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as

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creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

"SEC. 60*a*. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"*b*. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property, or its value from such person.

"*c*. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

"SEC. 57*g*. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

"SEC. 68*a*. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class.

In the present case all the rubber was sold and delivered after the bankrupts' property had actually become insufficient to pay their debts, and their estate was increased in value thereby to an amount in excess of the payments made. The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of $546.89, and a loss to the seller of that amount less such dividends as the estate might pay. In these circumstances the payments were no more preferences than if the purchases had been for cash, and, as parts of one continuous *bona fide* transaction, the law does not demand the segregation of the purchases into independent items so as to create distinct pre-existing debts, thereby putting the seller in the same class as creditors already so situated, and impressing payments with the character of the acquisition of a greater percentage of a total indebtedness thus made up.

We do not think the slight variation in the dates of sales and payments affords sufficient ground for the distinction put forward by counsel between the payments of September 4 and 28 and the payment of October 29 (which he concedes should be upheld) in their relation to the rubber furnished August 17 and 28 and September 30. All the material was sold and delivered after August 15, and neither of the items can properly be singled out as constituting outstanding indebtedness, payment of which operated as a preference.

The facts as found in *Pirie* v. *Trust Company* were so entirely different from those existing here that this case is not controlled by that. In view of similar vital differences it has been held by the Circuit Court of Appeals for the First Circuit, *Dickson* v. *Wyman*, 111 Fed. Rep. 726; Second Circuit, *In re Sagor and Brother*, 9 Am. Bank. Rep. 361; Third Circuit, *Gaas* v. *Ellison*, 114 Fed. Rep. 734; Eighth Circuit, *Kimball* v. *Rosenham Company*, 114 Fed. Rep. 85, that payments on a running account, where new sales succeed payments, and the net result is to increase the value of the estate, do not constitute preferential transfers under section 60*a*.

Judgment affirmed.

Mr. Justice WHITE and Mr. Justice MCKENNA, not being able to concur in the reasons by which the court in the opinion just announced distinguishes this case from that of *Pirie* v. *Chicago Title & Trust Co.*, and deeming the latter case controlling in this, dissent.